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APPENDIX ONE

Footnote

2 *Los Angeles Lumber Co. v. Case,* 380 U.S. 186; 60 S. Ct. 1 (6):

"The Court is not a mere ministerial register of the vote of the several classes of security holders. All those interested in the estate are entitled to the Court's (both trial and appellate) protection." *(Parenthetical statement added.)*

3, 19 *Northern Pacific R.R. Co. v. Boyd,* 288 U.S. 482; 33 S. Ct. 554:

"... to the extent of their debts creditors are entitled to priority over stockholders against all the property of a corporation." *Kansas City Terminal v. Central Union Trust Co.,* 271 U.S. 445; 46 S. Ct. 549 ...

"... the stockholder's interest in the property is subordinate to the rights of the creditors. First, of secured, and then unsecured creditors." "... any arrangement of the parties by which the subordinate rights and interests of the stockholders are attempted to be secured at the expense of the prior rights of either class of creditors comes within judicial denunciation." *Louisville Trust Co. v. Louisville, New Albany & Chicago Ry. Co.,* 174 U.S. 674; 19 S. Ct. 827, 684 ... pp. 6 & 7.

4 *In re: Consolidated Motor Parts, Inc.,* 82 F. 2d 579 (C.A. 2)

Judge August N. Hand in his decision for the

Footnote 4 (C't'd)

court in the *Consolidated Motor Parts* case, at page 580, dealt with a situation almost parallel:

> "The appellant was an attorney for creditors and as such may be allowed compensation for 'services rendered * * * in connection with the proceeding and plan.' If he had been counsel for a creditors' committee and had rendered substantial services in preparation of a plan of reorganization, he would have come within a familiar category. That he did not represent a large proportion of the creditors and that he assisted in bringing about the plan finally adopted by objecting to the discriminatory features of the original and alternative plans did not, in our opinion, deprive him of a right to compensation. He rendered no less important services 'in connection with the * * * plan' adopted though they were performed in court in assailing the plans first proposed, rather than in working with a committee upon a plan prior to the presentation in court. In the present case he seems to have been the very person who brought about the non-discriminatory plan which finally prevailed. In doing this, we think that he rendered substantial services 'in connection with the proceeding and the plan' within the meaning of section 77B(c) (9). If he had merely done work with opposing a plan that substantially prevailed, he would hardly have been entitled to compensation from the estate."

> "(2) The services by appellant in connection with a plan of reorganization which will justify an allowance from the estate under section 77B must have contributed in some substantial way to the plan finally adopted, and in nearly all cases the decision

Footnote 4 (c't'd) of the District Court that they have not been sufficiently important or direct to deserve an allowance must be regarded as final. But here the appellant contributed to the final adoption of the plan, and the justice of the plan does not seem to be questioned. Under such circumstances, and in spite of the broad discretion lodged in the District Court, we see no reason for depriving him of all compensation for his contribution to a plan that will enable the debtor to become rehabilitated and resume business. Section 77B (c) (9), 11 U.S.C.A. 207, (c) (9), appears to empower the court to award compensation to those persons who substantially contribute to a plan of reorganization. The creditors as a whole are interested in having some workable plan adopted, and the mere fact that work which has substantially aided the plan finally approved has been performed by an attorney for creditors or stockholders owning interests adverse to some of the other parties, does not necessarily deprive him of compensation. The question is whether the work in connection with the plan has been performed in good faith and has substantially contributed to the result finally achieved."

5, 10, 19 *First National Bank of Cincinnati v. Flershem*, 290 U.S. 504; 54 S. Ct. 298, 306:

"In justifying the action taken, the Court of Appeals called the attention to the fact that the non-assenting creditors had not introduced any evidence to prove their contention that the sale should not be confirmed. In view of the undisputed facts stated above, the introduction of such evidence was not indispensable. The failure to secure an adequate

Footnote 5, 10, 19 (C'td)

price seems to have been due, not to lack of opposing evidence but to the mistaken belief that it was the duty of the court to aid in effectuating the plan of reorganization, since a very large majority of the debenture holders had assented to it. Moreover, the court stood in a position different from that which it occupies in ordinary litigation, where issues are to be determined solely upon such evidence as the contending parties choose to introduce. In receivership proceedings, as was held in *National Surety Co. v. Coriell,* 289 U.S. 426, 436; 53 S. Ct. 678; 77 L. Ed. 1300, every important determination by the court calls for an informed, independent judgment; and special reasons exist for requiring adequate, trustworthy information where the jurisdiction rests wholly upon the consent of the defendant who joins in the prayers for relief. It would be unreasonable to impose upon a few dissenting creditors the heavy financial burden of making an adequate appraisal supported by the testimony of competent experts, where, as here, the assets include extensive plants and equipment located in nine states."

6, 7 *Pepper v. Litton,* 308 U.S. 295; 60 S. Ct. 238.

Speaking of the obligations of managing or controlling stockholders:

"He who is in such a fiduciary position cannot serve himself first and his *cestuis* second. He cannot manipulate the affairs of the corporation to their detriment and in disregard of the standards of common decency and honesty. He cannot by the intervention of a corporate entity violate the ancient pre-

Footnote 6, 7 (Cont'd)

cept against serving two masters. He cannot by the use of the corporate device avail himself of privileges normally permitted outsiders in a race of creditors. He cannot utilize his inside information and his strategic position for his own preferment. He cannot violate rules of fair play by doing indirectly through the corporation what he could not do directly. He cannot use his power for personal advantage and gain to the detriment of the stockholders and creditors no matter how absolute in terms that power may be and no matter how meticulous he is to satisfy technical requirements. For that power is at all times subject to the equitable limitation that it may not be exercised for the aggrandizement, preference, or advantage of the fiduciary to the exclusion or detriment of the cestuis. Where there is a violation of those principles, equity will undo the wrong or intervene to prevent its consummation. * * *

No matter how technically legal each step in that scheme may have been, once its basic nature was uncovered, *it was the duty of the bankruptcy court in the exercise of its equity jurisdiction to undo it.* (Emphasis supplied) Otherwise, the fiduciary duties of dominant or management stockholders would go for naught; exploitation would become a substitute for justice; and equity would be perverted as an instrument for approving what it was designed to thwart."

For further discussion of the equitable rights of creditors against self-dealing officers, directors and stockholders, see *In Re. V. Loewer's Gamrinus Brewery Co.*, 167 F. 2d 318 (2d Cir.); *Goldie v. Cox*, 130 F. 2d 695;

Footnote

Arnold v. Phillips, 117 F. 2d 497 (5th Cir.) and for a very recent case, *Bankers Life & Casualty Co. v. Kirtley,* 338 F. 2d 1006 (8th Cir., 1964).

12. *Security Mortgage Co. v. Powers,* 278 U.S. 149; 49 S. Ct. 84:

"(Under Georgia law) The contingent obligation to pay attorneys fees was a part of the original transaction. The consideration was not the attorney's services, but the $90,000 advanced by the (lender) . . ."

"An agreement to pay attorneys fees in promisory notes is in the nature of liquid damages which inures to benefit of the plaintiff, and is not a provision for the benefit of the attorney at law who brings suit on the notes to recover . . . principal interest and attorneys fees."
Spence v. Phillips, 172 Ga. 782 (4)

"Where a promissory note provides for the payment by the maker of principal, interest, and attorney fees, the attorney fees are part of the principal debt.
Evans v. Atlantic National Bank, 147 Ga. 621 (2)

"The stipulation in the note for the payment of attorneys fees and presumably this suit counting for attorneys fees is proceeding solely for the benefit of plaintiff." (lender)
Carson v. Blair, 31 Ga. App. 60 (2).

"Obligations to pay attorneys fees upon any note . . . in addition to interest . . . shall be valid and enforceable and collectible as part of the debt . . ."
Code of Georgia, 20-506.

Footnote

13 *Consolidated Rock Products v. DuBois,*
312 U.S. 610; 61 S. Ct. 675:

"... 'any arrangement of the parties by which the subordinate rights and interests of the stockholders are attempted to be secured at the expense of the prior rights' of creditors 'comes within judicial denunciation.' *Louisville Trust Co. v. Louisville, New Albany & Chicago Ry. Co.,* 174 U.S. 674, 684; 19 S. Ct. 827, 830; 43 L. Ed. 1130. And we indicated in *Case v. Los Angeles Lumber Products Co.,* supra, that that rule was not satisfied even though the 'relative priorities' of creditors and stockholders were maintained. (308 U.S. pages 119, 120; 60 S. Ct. page 9, 84 L. Ed. 110)."

"The instant plan runs afoul of that principle. In the first place, no provision is made for the accrued interest on the bonds. This interest is entitled to the same priority as the principal."

The very purpose of the Absolute Priority Rule is to prevent the stockholders of a corporation with assets from using a reorganization to wash out the creditors at a fraction of their claims, and then take back the corporation and remaining assets, *sans* creditors.

22 *Irvin v. Life of Tennessee,*
204 Ga. 582.

In the Irvin case all the insurance companies did was fail to perform the task of collecting on collateral which they held. In this case these stockholders *removed* the collateral assets. The Georgia Supreme Court would not let the insurance company charge Irvin with the expense resulting from their mere neglect; will this court let these stockholders

Footnote
22 (c'td) charge appellants (by failing to reimburse appellants) the expenses resulting from the stockholders' fraudulent withdrawals and their further continued, wilful wrong in failing to return these assets which are in effect collateral for all the creditors' claims?

> ". . . It is not alone fraud or illegality which will prevent a suitor from entering a court of equity; any really unconscientious conduct, connected with the controversy to which he is a party, will repel him from the forum whose very foundation is good conscience . . ."

Without consideration, these stockholders have received the Calhoun heirs' 5/110 right to all of the Den-Nap assets by appellants' mistaken reliance upon their full and truthful disclosure of the facts concerning the condition of Den-Nap at the time of the Reorganization. To qualify for equity it would appear that their first responsibility would be to restore to the Calhoun Estate's minor heirs that 5/110 of all the Den-Nap assets.

> ". . . when applying for relief in court of equity, (everyone) is as much bound to do equity as is a private litigant . . ."
> *Lacy v. United States,* 216 F. 2d 233, 234.

(See also, Appellants Brief on Extraordinary Motion, in the Circuit Court pages 39-46. Record, separately certified and bound.)

One is forced to ask, can any other composition or contract come out of a Chapter X proceeding besides the written Chapter X Plan itself?

May separate and conflicting *unwritten* contracts be

Footnote 22 (C'td) enforced by the controlling stockholders when the plan is their own Private Purchase Plan of Composion-with-Creditors?

Or, can controlling stockholders vary their written Chapter X Plan of composition at will?

We believe under Chapter X law and under the general Common Law of Compositions adhered to in Georgia, all the valid and controlling agreements must be written into the Plan of Composition to be enforceable when contrary to the express provisions of that plan.

From the statute it would appear that under Chapter X the Plan is the ultimate arbiter of all rights and duties of creditors and stockholders. 11 U.S.C.A. § 623.

The same result will obtain for any composition under Common Law.

> "If a debtor misrepresents or suppresses any material fact in the statement of his affairs, either as to the amount of his property or the amount of his indebtedness, the composition agreement is void."
>
> *Woodruff & Company v. Saul,* 70 Ga. 271 (2).
>
> "The rules which pertain to 'composition of debts' by debtors in failing circumstances are distinct from those which relate to accord and satisfaction."
>
> *Brown Shoe Co. v. Rowell,* 187 So. 498 (2).
>
> "Composition (also) differs from ... Compromise and Settlement ... ditto *15 C.J.S. Compositions § 3, p. 644, C.J.S. § 2, 672.*"
>
> "A composition with creditors contemplates that all who participate shall do so on equal terms ... (per their respective classifications.)"
>
> *Brown Shoe Co. v. Rowell,* 187 So. 498 (3).

Footnote
22 (c'td) See also, *Saul v. Buck Hefflebower & Neer*, 72 Ga. 254; *Von Eberstein v. Standard Oil Co. of Kentucky*, 41 Ga. App. 770 (1930).

"Any plan to be sufficient should be definite . . . before being submitted for acceptance in order that creditors . . . may be apprised of their exact standing if the plan is accepted . . ."

Down Investment Assn. v. Boston Management Bldg., Inc., D. C. A. 1 (1930), 81 F. 2d 314 (3): "Corporate reorganization plan under amendment to Bankruptcy Act is in substance a composition between creditors and debtors and is merely extension of principal of composition agreement of original Bankruptcy Act . . ."

and see also, Headnote 4: (at page 318)

"Agreement to be binding must be so definite that promises and performances to be rendered by each party are reasonably certain."

If in fact the intent to take away appellants' Chapter X fee was present, it was the stockholders' duty to put this provision in their private purchase-composition plan when they reduced it to writing, and before it was submitted to the creditors for their approval. The plan having failed to set out any limitations on their rights, appellants' clients and their attorneys, not having understood or agreed to any waiver, are entitled to equal treatment with all others who contributed to this Estate and to the composition plan, and who in fact were granted and paid their fair attorneys' fees in accordance with the standards set by Chapter X.

EXHIBIT A

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

JOHN K. CALHOUN, individually and as attorney for the Estate of C. F. Calhoun,

Appellant,

versus

CHARLES C. HERTWIG, Trustee, Et Al.

Appellee.

No. 23347

ON CONSIDERATION OF THE APPLICATION of the Appellant in the above numbered and entitled cause for a stay of the mandate of this Court therein, to enable Appellant to apply for and to obtain a writ of certiorari from the Supreme Court of the United States, IT IS ORDERED that the issue of the mandate of this Court in said cause be and the same is stayed for a period of 90 days; the stay to continue in force until the final disposiiton of the case by the Supreme Court, provided that within 90 days from the date of this order there shall be filed with the clerk of this Court the certificate of the clerk of the Supreme Court that certiorari petition and record have been filed. It is further ordered that the clerk shall issue the mandate upon the filing of a copy of an order of the Supreme Court denying the writ, or upon the expiration of 90 days from the

date of this order, unless the above mentioned certificate shall be filed with the clerk of this Court within that time.

DONE AT NEW ORLEANS, LA., THIS 31st day of October, 1966.

/s/ Griffin B. Bell
United States Circuit Judge

(ORIGINAL FILED – NOVEMBER 2, 1966)

EXHIBIT B

October 20, 1966

Re:

No. 23347—John K. Calhoun, etc.
—vs—Charles C. Hertwig
Trustee, Et Al

Gentlemen:

You are hereby advised that the court has today entered an order denying the Petition for Rehearing in the above case. No opinion was rendered in connection therewith.

Very truly yours,

/s/ EDWARD W. WADSWORTH

EDWARD W. WADSWORTH,
Clerk

Mr. Charles E. Watkins, Jr.
Attorney at Law
Atlanta, Georgia

Mr. Wallace Miller, Jr.
Attorney at Law
Macon, Georgia

Mr. Charles M. Cork
Attorney at Law
Macon, Georgia

Mr. Paul R. Ervin
Attorney at Law
Charlotte, N. C.

Mr. T. Baldwin Martin, Jr.
Attorney at Law
Macon, Georgia

(Filed U. S. Court of Appeals, August 9, 1966.
Edward W. Wadsworth, Clerk)

EXHIBIT C

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 23347

JOHN K. CALHOUN, individually and
as attorney for the Estate of C. F. Calhoun

Appellant

Versus

CHARLES C. HERTWIG, Trustee, Et Al

Appellees

Appeal from the United States District Court for
the Middle District of Georgia

Before TUTTLE, Chief Judge, BELL, Circuit Judge and KILKENNY, District Judge.

BY THE COURT:—

IT IS ORDERED that the motion of Appellant to accept his petition for rehearing and brief in support in its present form and to accept same out of time be, and the same is hereby GRANTED. The motion for rehearing is DENIED.

EXHIBIT C

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

October Term, 1965

NO. 23347

D. C. Docket Nos. 8286, 8287 and 8288—Bankruptcy

JOHN K. CALHOUN, individually and as attorney for the Estate of C. F. Calhoun,

Appellant,

versus

CHARLES C. HERTWIG, Trustee, Et Al,

Appellees.

Appeal from the United States District Court for the Middle District of Georgia.

Before TUTTLE, Chief Judge and BELL, Circuit Judge and KILKENNY,* District Judge.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Middle District of Georgia, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed.

It is further ordered and adjudged that the appellant, John K. Calhoun, individually and as attorney for the Estate of C. F. Calhoun, be condemned to pay the costs of this cause in this Court for which execution may be issued out of the said District Court.

June 28, 1966

---

*Of Portland, Oregon, sitting by designation.

Issued as Mandate:

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EXHIBIT D

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 23347

JOHN K. CALHOUN, individually and as attorney for the Estate of C. F. Calhoun,

Appellant,

versus

CHARLES C. HERTWIG, Trustee, ET AL.,

Appellees.

Appeal from the United States District Court for the Middle District of Georgia.

(June 28, 1966.)

Before TUTTLE, Chief Judge and BELL, Circuit Judge and KILKENNY,* District Judge.

BELL, Circuit Judge: Appellants were the attorneys for the estate of C. F. Calhoun, a creditor involved in the reorganization under Chapter X of the Bankruptcy Act of Den-Nap Electric Mold Co. and two related corporations,

---

* Of Portland, Oregon, sitting by designation.

Poplar Foundries, Inc. and Precision Recapping Equipment Co. They petitioned the District Court for $11,367.60 in attorneys' fees and $873.04 expenses to which they claim that they are entitled for services rendered in the reorganization proceedings. This appeal is taken under § 250 of the Bankruptcy Act, 11 USCA, § 650, from an order denying their claim.

The facts are that these corporations applied for relief in 1961 under Chapter X of the Bankruptcy Act. The dominant figures in each of the corporations were the majority stockholders who were also the chief executive officers. The three corporations were treated as one in the reorganization proceedings so as to eliminate any problem regarding inter-corporate debts or other obligations or arrangements. Appellants, Messrs. Calhoun, Russell and Watkins, participated in the proceedings as counsel for the estate of C. F. Calhoun, the father of one of appellants. Mr. Calhoun was a stockholder in and a creditor of Den-Nap by reason of its purchase of certain patent rights and equipment from him. The exact amount of his claim was disputed as we shall see. The creditor corporations were operated by a trustee from 1961 until the date of the completed reorganization in 1965.

On February 12, 1965, a meeting was held to discuss an initial reorganization plan suggested by the debtors. This plan provided for payment to the general creditors of forty cents on the dollar, together with full payment of all secured and priority claims and costs of administration. Substantially all of the Calhoun claim was in the forty per cent category. The trustee and all creditors

except the Calhoun estate were willing to accept the plan. Appellants, as the Calhoun attorneys, considered the plan unfair and refused to accept it. They then contacted numerous companies in an effort to find a purchaser for the debtors' assets so as to make possible a better plan. They were successful in finding a purchaser, the Super Mold Corporation of California. This company in fact came to Macon and inspected the properties on the very next day, February 13, 1965. A sale to Super Mold would have made possible a reorganization plan which would more nearly satisfy the claims of the creditors.

Appellants drafted and filed a plan on March 22, 1965, which was based on the increased assets from the sale to Super Mold Corporation. The creditors' committee submitted their own revised plan on March 26, 1965. On March 30, 1965, a hearing was held at which time the court had all the submitted plans before it. After explanation of the three plans the court adjourned until the afternoon of the same day. This recess was taken for the purpose of giving the interested parties an opportunity to reach a mutually satisfactory agreement. The difficulty in agreeing on a plan stemmed from the fact that the amount of the Calhoun claim was disputed. The disputed amount was approximately $26,000 which was largely made up of interest accruing since the initiation of the reorganization proceedings in 1961 plus attorneys' fees on the accelerated portions of certain notes. Finally, an agreement was reached which provided that all of the other general creditors would voluntarily reduce their claims by eleven per cent in order to raise the $26,000

which the Calhoun estate claimed and thus pay the Calhoun claim in full.

When the hearing was reconvened in the afternoon, the compromise agreement was explained; and the parties agreed to submit to the court a written plan embodying the features of it. At this time the following colloquy took place between the court and Mr. Calhoun, counsel for his father's estate:

> "THE COURT: The other thing I want to be sure of, if this plan goes through, Mr. Calhoun, every matter concerning which you have suggested any issue and every question which you have raised by any of the pleadings which you have filed in connection with the matter or any which could have been raised which you have not raised, will be terminated and disposed of; is that understood?
>
> "MR. CALHOUN: Your Honor, I'm happy to be bound by the agreement and upon the approval of a plan which provides $98,724.15 in cash, everything that we have in this proceeding will be dismissed.
>
> "THE COURT: Well, when you say 'in cash', you mean at the same time all the other creditors are paid?
>
> "MR. CALHOUN: At the same time as the other creditors.
>
> "THE COURT: At the same time all the other creditors are paid.

"MR. CALHOUN: Yes sir, and yet, we wish to reserve our right to dismiss until that date.

"THE COURT: Oh, yes, but the plan, when we talk about 'the plan', when the plan is approved, if the Court approves it, that terminates every question which you have raised or could have raised.

"MR. CALHOUN: Yes, sir, I would rather state it that when a distribution is made under the plan, that settles everything, terminates everything.

"THE COURT: All right, I wanted to be sure . . ."

Counsel for the debtors objected to this payment to the Calhoun estate on the ground of unjust enrichment but counsel for the trustee and also for the creditors' committee recommended that it be approved. Counsel for the creditors' committee stated that he acceded to avoid further delay and to recognize the efforts of counsel for the Calhoun estate in finding Super Mold and thus bringing about a better payment plan for the creditors. The plan was approved by the court, unanimously accepted by the creditors and confirmed by the court.

At the time of this colloquy between the court and Mr. Calhoun, the proposed plan of reorganization submitted by Mr. Calhoun, as executor of his father's estate and as counsel for the estate, was before the court. It contemplated a purchase of the stock of the reorganized

corporation by Super Mold Corporation, and provided for fees as follows:

> "Subject to the agreement of the successful purchaser and/or the order of the Court, the Trustee shall deliver to the authors of this Plan such amount of the Class A Common Stock in the Reorganized Corporation as the parties may agree upon as the reasonable fee for the work done in connection with the prosecution of the Petition to Confirm the Re-Consolidation of all the Assets and Eliminate the Claims of Dennis and Mattox in this proceeding, and in connection with this Plan of Reorganization for the three corporations."

The proposed plan which included this suggested fee arrangement was filed on March 22, 1965. On March 9, 1965 a petition had been filed by Mr. Calhoun to set aside certain claims of the majority stockholders against the corporation and the suggested plan of reorganization was spelled out to some extent in that pleading. A claim for attorneys' fees to be payable in stock was asserted therein. Moreover, on July 3, 1964, Mr. Calhoun advised counsel for the trustee in writing that counsel for the Calhoun estate were entitled to attorneys' fees to the extent that they had contributed to the reorganization. Counsel for the trustee replied on July 7, 1964 that any claim for attorneys' fees which they might make should be submitted to the court. Thus, there was no doubt that these lawyers had fees in mind at the time of the colloquy with the court. Nevertheless, on April 29, 1965

appellants applied for attorneys' fees and costs. A hearing on their application was held on May 4, 1965, with the result that the application was denied.

The court gave two reasons for the denial. First, the court deemed the question foreclosed by the foregoing colloquy; and second, the claim was denied as a matter of law on the ground that the services rendered had been, when considered in light of their primary purpose of representing their client, ". . . too remote, unintended and incidental to the primary purpose . . . to be susceptible of valuation . . . or compensable by allowance in this proceeding."

We think the District Court erred in finding that as a matter of law appellants' services were too remote and incidental to be compensable. In being the only objecting party to the first proposed plan, and in later making possible a much more desirable plan through negotiation with Super Mold Corporation, appellants benefited not only their own client but also the other creditors. The record conclusively shows that they did substantially contribute to the plan of reorganization. As was stated in *In Re Consolidated Motor Parts, Inc.*, 2 Cir., 1936, 85 F.2d 579, ". . . the question is whether the work in connection with the plan has been performed in good faith and has substantially contributed to the result finally achieved."

We hold, however, that the order of the District Court denying the award of attorneys' fees and costs was correct and should be affirmed. The agreed settlement, as stated

above, was made possible by the fact that the general creditors accepted an eleven per cent reduction of their claims in order to provide the additional $26,000 on the Calhoun estate claim. Appellants contend that this sum was rightfully due and should not militate against their present claim. However, it appears that the general creditors made the concession in part in recognition of the contribution made by appellants in procuring the Super Mold bid. And it is worthy of note that the $26,000 in dispute, based on post Chapter X interest as well as attorneys' fees, included, as near as can be determined from the record, some $10,000 in attorneys' fees.

The approach which we take to this matter is stated in 6A Collier, Bankruptcy, § 13.02 at pp. 904-908, as follows:

> "In determining the allowances to be made, Chapter X . . . confers upon the judge a broad discretion, with which an appellate court will not interfere except for an abuse thereof or an erroneous application of the law . . . . The mere fact, however, that a claimant is a person to whom Chapter X permits compensation or reimbursement to be given does not mean that the claimant must be accorded an allowance. Nor does participation in the proceedings, however rightfully, create any absolute right to compensation or reimbursement. . . .
>
> * * *
>
> "since the circumstances surrounding the particular claim will govern, it is impossible, of course, to lay down any hard and fast rules which

will fit all cases . . . . Nevertheless, the judge should endeavor to exercise fairly the discretion lodged in him with the double purpose of doing equity to the distressed debtor and its security holders and at the same time rewarding the proper activities of those participating in the proceedings."

On the face of things it would appear that appellants did produce such benefit to the estate as would bring them within the fee allowance section, 11 USCA, § 643,[1] especially in light of the liberal application of the test ". . . to insure the vigorous representation of all security holders and the protection of minority groups." 6A Collier, Bankruptcy, § 13.02 at pp. 914-915. See also § 13.12, p. 974. It is objective of Chapter X to encourage the participation of all interests and this should be kept in mind in attempting to draw a line between services rendered in connection with the reorganization broadly and those strictly in the interest of a particular claimant.

We hold, however, that the District Court did not abuse its discretion in denying the application of appellants for

---

[1] 11 USCA, § 643:

"The judge may allow reasonable compensation for services rendered and reimbursement for proper costs and expenses incurred by creditors and stockholders, and the attorneys for any of them, in connection with the submission by them of suggestions for a plan or of proposals in the form of plans, or in connection with objections by them to the confirmation of a plan, or in connection with the administration of the estate. In fixing any such allowances, the judge shall give consideration only to the services which contributed to the plan confirmed or to the refusal of confirmation of a plan, or which were beneficial in the administration of the estate, and to the proper costs and expenses incidental thereto."

fees and costs when we consider the fact of the extra payment of $26,000 and the representations of appellants to the court at the time. Mr. Calhoun had in mind claiming a fee for services rendered in the reorganization. He was the leading counsel for his group. He had corresponded with counsel for the trustee relative to such a fee. He had claimed a fee in two pleadings which were before the court at the time. He thus was aware of his right to claim a fee for himself and his co-counsel, and had full opportunity to assert or reserve such a claim when the matter of the settlement was before the court. He did neither. The District Court did not err in holding them to the position Mr. Calhoun took at that time, especially in light of the fact of the attorneys' fees which they received as a part of the disputed $26,000 payment.

AFFIRMED.

Adm. Office, U. S. Courts—E. S. Upton Printing Co., N. O., La.

(Filed at 8:45 A.M., May 5, 1965.

John P. Cowart, Clerk, U. S. District Court)

EXHIBIT E

IN THE DISTRICT COURT OF THE UNITED STATES, FOR THE MIDDLE DISTRICT OF GEORGIA, MACON DIVISION

In the Matter of: DEN-NAP ELECTRIC MOLD COMPANY, POPLAR FOUNDRIES, INC. and PRECISION RECAPPING EQUIPMENT COMPANY	In Proceedings for Reorganization under Chapter X, Bankruptcy Act. Nos. 8286, 8287 and 8288

ORDER OF COURT AFTER HEARING ON TRUSTEE'S PETITION IN AID OF CONSUMMATION OF THE PLAN

After hearing pursuant to previous notice on the Trustee's petition in aid of consummation of the plan,

IT IS ORDERED that:

(1) Charles C. Hertwig, Trustee, shall not convey title to any of the assets of the debtor corporations, or either of them, until after he has in hand, or simultaneously with his having in hand, the sum of $535,000.00, to be utilized by him in consummation of said plan, and which sum shall, by said Trustee, be deposited in an account pursuant to said plan and be disbursed only upon order of the Court.

(2) Upon Charles C. Hertwig having in hand such cash sum, or simultaneously therewith, he is hereby ordered and directed to:

(a) Execute all instruments and conveyances of all kinds, as set forth in the plan, and to take such other steps and perform such other acts as the plan embraces and as are necessary for its consummation.

(b) Pay in full the creditors of Precision Recapping Equipment Company listed in his petition for an order in aid of consummation of the plan, totaling $15,306.63, other than the amount shown on this company's books due Eastern Air Lines in the amount of $709.72 (it appearing this amount being shown on the company's books in error, and no claim therefor was filed.)

(c) Pay in full the tax claims against Poplar Foundries, Inc. and Den-Nap Electric Mold Company, shown in said petition as totaling $30,439.36; and pay in full the claim of Fickling & Walker, Inc. in the amount of $30,000 principal and interest at the rate of 8% per annum until date (the same amounting to $41,400, principal and interest, as of May 25, 1965); and pay in full the claim of the Calhoun Estate in the amount of $98,724.15, upon the Calhoun Estate performing the acts required of it under the plan in consideration of such payment.

(d) Pay the other general creditors of Poplar Foundries, Inc. and Den-Nap Electric Mold Company the amount of their claims according to the plan, less their proportionate part of $26,424.15. (This amount is shown in said petition as $215,374.33, less $26,424.15, leaving $188,905.18, or 87.73% of the claims to be paid.)

(e) Upon payment of all such claims, whether the

same is required in the plan or contemplated under the law, the Trustee may demand such receipts, releases, acquittances, satisfactions of record, and other acts to be done and accomplished by the recipients of the funds so paid.

(f) The remainder of the funds in the hands of the Trustee shall remain on deposit in said account, subject to disbursement only by further order of the Court.

So ordered, this 4th day of May, 1965.

J. Robert Elliott
United States District Judge

I hereby certify that I have this date mailed one copy of the within to District Director of Internal Revenue, Atlanta, Ga., one copy to Secretary of the Treasury, Washington, D. C., and two copies to Securities and Exchange Commission, Washington, D. C.

At Macon, Ga. this May 5, 1965.

Lucille H. Robinson
Deputy Clerk

(Filed at 10:30 A.M., Dec. 21, 1964. John P. Cowart, Clerk, U. S. District Court.)

EXHIBIT F

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA
MACON DIVISION

In the Matter of: DEN-NAP ELECTRIC MOLD COMPANY, POPLAR FOUNDRIES, INC., AND PRECISION RECAPPING EQUIPMENT COMPANY, Debtors	In Proceedings for Reorganization Nos. 8286 8287 8288

ORDER ON APPLICATION OF CHARLES M. CORK AND LOUIS REGENSTEIN, JR., FOR COMPENSATION

The Creditors Committee in the above cases through its counsel having orally moved at a hearing held in Columbus, Georgia on November 4, 1964, for an early assignment and determination of the application of Charles M. Cork and Louis R. Regenstein, Jr., for the allowance of reasonable compensation for services rendered and for reimbursement of proper costs and expenses incurred by them as special counsel for Charles C. Hertwig, Trustee of the above named Debtors, the same was by order of this Court assigned for a hearing in Macon, Georgia on December 10, 1964, the hearing to be held on said application and objections thereto

filed by the Creditors Committee. The hearing was duly held pursuant to said assignment. Evidence was presented and arguments of counsel were heard and the same considered by the Court.

The said attorneys, Charles M. Cork and Louis Regenstein, Jr., were appointed to represent the Trustee in opposing claims of the United States for alleged income tax deficiencies for the years 1951 through 1960. As a result of said services the claim of the United States in the amount of $1,710,223.77 was disallowed in its entirety. This claim consisted of the principal amount of $918,639.04, interest accrued prior to the filing of the petition under the Bankruptcy Act in the amount of $327,400.03, and penalties of $464,184.70 under Section 293 (b) of the Internal Revenue Code of 1939 and Section 6653 (b) of the 1954 Code. As a further result, a net operating loss carry-forward from the years involved in the claim in the aggregate amount of $574,015.91 was established and a refund of Federal income taxes theretofore paid in the amount of $42,596.80, plus interest, was obtained. The denial of the claim of the United States disposed of a corresponding liability for income taxes to the State of Georgia in the amount of approximately $150,000.00. Furthermore, the principles established in this matter have saved these companies, and will in the future save these companies substantial additional income taxes in each year subsequent to 1960.

Although the claim of the United States was directed against Den-Nap Electric Mold Company, the assets of Poplar Foundries, Inc., and of Precision Recapping Equipment Company would have also been subject to the claim. (Emphasis added)

Had the United States succeeded in establishing the

validity of its claim substantially all of the assets of these Debtors would have been taken by virtue of the priority status of the United States' claim, except for amounts owed to secured creditors.

By order of this Court the value of these Debtors' estates has been recently appraised by Mr. Thomas H. Hall, III, M.A.I., C.R.E. Mr. Hall finds that if inter-company accounts are eliminated and if the claims of two stockholders, C. O. Dennis and Zeb Mattox, are eliminated, each of the Debtors is now solvent and on a consolidated basis the Debtors are solvent. The appraisal places a net value upon the consolidated companies of $1,238,500.00, after the deduction of all liabilities except the liabilities to the aforesaid two stockholders.

The financial statements of these companies similarly show the companies to be solvent, both individually and consolidated, after the elimination of inter-company indebtedness and the claims of the above stockholders. The latest such financial statement made by an independent certified public accountant for the Trustee with the permission of the Court and prepared as of June 30, 1964, shows gross consolidated assets of $2,076,215.53 and gross consolidated liabilities of $612,550.60 (after eliminating amounts owed to the above two stockholders). Of the aforesaid liabilities approximately $100,000.00 represents secured creditors and $512,550.60 general creditors. In the asset figure, patents owned by Precision are included at book value after amortization, $568,558.63, and the stock of Den-Air, Inc., a wholly owned subsidiary of Precision, at approximately $119,000.00. These patents were appraised by Mr. Hall for $388,000.00 and the stock of Den-Air, Inc. was appraised by him at $375,000.00.

The results obtained by the petitioning attorneys required great skill, effort, and time. The assets of the debtors were preserved and augmented and it is highly probable that the general creditors will ultimately receive a substantial part of their claims.

In the opinion of the Court, were the subject Debtors solvent going concerns a fee to the applicants of not less than 15% of the amounts saved would be reasonable compensation but in view of the financial condition of the Debtors the Court will allow only 7½%. Since the amount of the net assets, as appraised by Mr. Hall, $1,238,500.00, is less than the amount of taxes, penalties and pre-reorganization interest, the Court will allow only 7½% of the amount of Mr. Hall's appraisal. Accordingly, it is determined that the sum of $92,887.50 is reasonable compensation for all services rendered by said petitioning attorneys in connection with said tax claims and that $32.42 is the amount of proper costs and expenses incurred by them in these proceedings and remaining unreimbursed. The foregoing amounts are hereby allowed as reasonable compensation for services rendered and as reimbursement of proper costs and expenses. Charles C. Hertwig, Trustee of said Debtors, is directed to make payment of such allowance.

IT IS SO ORDERED this 18th day of December, 1964.

/s/ J. ROBERT ELLIOTT

J. ROBERT ELLIOTT
United States District Judge

(Filed at 8:30 A.M., Jan. 27, 1965. John P. Cowart, Clerk, U. S. District Court.)

EXHIBIT F (Cont.)

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA
MACON DIVISION

In the Matter of: DEN-NAP ELECTRIC MOLD COMPANY, POPLAR FOUNDRIES, INC., AND PRECISION RECAPPING EQUIPMENT COMPANY, Debtors	In Proceedings for Reorganization Nos. 8286 8287 8288

ORDER ON MOTION TO AMEND AND MODIFY THE COURT'S JUDGMENT FIXING ATTORNEYS' FEES FOR CHARLES M. CORK AND LOUIS REGENSTEIN, JR., OR IN THE ALTERNATIVE FOR A NEW TRIAL

Upon motion of the Creditors Committee in the above cases this Court on December 10, 1964 heard evidence and argument of counsel pertinent to a determination of the application of Charles M. Cork and Louis Regenstein, Jr., for the allowance of reasonable compensation for services rendered and for reimbursement of proper costs and expenses incurred by them as special counsel for Charles C. Hertwig, Trustee of the above named debtors. Subsequently, on December 18, 1964, this Court entered its order allowing certain amounts as reasonable

compensation to said attorneys for services rendered and as reimbursement of proper costs and expenses. Thereafter, on December 24, 1964, the Trustee and the Creditors Committee filed their motions suggesting that the Court amend and modify its order and judgment of December 18, 1964, or, in the alternative, that a new trial of the matter be granted. All parties concerned were invited by the Court to submit memoranda in support of or in opposition to said motion and the Court has now had the benefit of the views of the parties and their counsel as set forth in such memoranda.

The Court has given careful consideration to all of the contentions made with respect to the Court's original order of December 18, 1964 and the Court is not persuaded that there should be any amendment, revision or modification of said original order, and further, that no constructive purpose would be served by the grant of a new trial with respect to the matter at issue. Accordingly, the opinion of the Court heretofore expressed is adhered to and the motion to amend the Court's order and judgment entered December 18, 1964, or in the alternative, for the grant of a new trial, is hereby denied.

IT IS SO ORDERED this 26th day of January, 1965.

/s/ J. ROBERT ELLIOTT

J. ROBERT ELLIOTT
United States District Judge

(Filed at 9:00 A.M., Jul. 15, 1965. John P. Cowart, Clerk, U. S. District Court.)

EXHIBIT G

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA
MACON DIVISION

In the Matter of: DEN-NAP ELECTRIC MOLD COMPANY, POPLAR FOUNDRIES, INC. AND PRECISION RECAPPING EQUIPMENT COMPANY	In Proceedings for Reorganization under Chapter X, Bankruptcy Act Nos. 8286, 8287 and 8288

MEMORANDUM OPINION AND ORDER ON APPLICATION OF MESSRS. RUSSELL, WATKINS AND CALHOUN FOR ALLOWANCE OF ATTORNEY'S FEES AND EXPENSES

Petitioners are attorneys for the Estate of C. F. Calhoun, one of the largest creditors of Den-Nap Electric Mold Company. Den-Nap is one of the debtors in a combined corporate reorganization proceeding instituted in this Court in February, 1961, under Chapter X of the Bankruptcy Act of the United States, said proceeding also relating to Poplar Foundries, Inc., and Precision Recapping Equipment Company. Petitioners seek an allowance, as calculated in their Amended Application, for $11,367.60 in attorney's fees and $873.04 as reimburse-

ment for costs incurred in connection with activities Petitioners contend should be compensable in connection with this proceeding. A hearing was held on Petitioners' application in Macon, Georgia, on May 4, 1965, at which time this Court also confirmed the reorganization plan which had been previously approved by substantially more than the required creditors of the three corporations, which plan envisioned the payment in full of administrative expenses and creditor's claims as proved in the plan.

In support of their application for allowance, Petitioners offered affidavits of two practitioners of the Atlanta, Georgia, Bar as to the value of their services. One of these affidavits estimated the value of Petitioners' services at from $40,000.00 to $50,000.00, and the second at from $45,000.00 to $75,000.00. In substance, Petitioners claim that it was through their efforts that the corporation which they contend to be the most valuable (Precision) was placed by its stockholders into the reorganization proceeding in 1961 only under threat of legal proceedings designed to accomplish that end; that had it not been for Petitioners a reorganization plan would have been approved in February, 1965, which would have paid creditors forty cents on the dollar, whereas, Petitioners contend that through their efforts, a competitor of the debtor corporations was brought in as an active bidder, offering to pay $400,000.00 for the assets of the debtor corporations, which amount Petitioners contend was sufficient to pay all administrative expenses and creditors in full; and that the presence of this outside bidder resulted in the debtor corporations submitting an amended reorganization plan which paid administrative expenses and creditors in full.

Attorneys for the debtor corporations filed objections to Petitioners' application, denying its allegations. Upon the hearing, attorneys for the debtor corporations, the purchaser under the reorganization plan, the creditors committee, one of the individual creditors, and the Trustee spoke in opposition to the allowance. Briefs were filed by the attorneys for the debtor corporation and the purchaser in support of their position. Opposition to the making of an allowance was based on two grounds: (1) that Petitioners were estopped from seeking such an allowance by virtue of certain statements made by one of the Petitioners to this Court while sitting in Columbus, Georgia on March 30, 1965, at which time the reorganization plan was amended through negotiations and approved by this Court, and, (2) that the Petitioners had failed to prove the allegations of their application and were not entitled to an allowance as a matter of law.

Based upon uncontroverted statements by interested parties made to this Court both on March 30th and upon the hearing of this petition on May 4th, the following emerges as to what transpired on the former date: the debtor corporations had proposed to amend their reorganization plan to pay creditors in full the amount of their respective claims as recognized by the Trustee, there being a difference of some $26,000.00 between the amount recognized by the Trustee as owing to Calhoun's Estate ($72,300.00) and the amount claimed by said Estate as owing to it ($98,451.15). The difference in amount was primarily composed of items the legitimacy of which were in dispute, *i.e.*, attorneys fees on the principal balance of the claim, exclusive of such fees on pre-Chapter X judgments, post-Chapter X interest and

the crediting of payments made on the Estate's claim during the reorganization period. The attorneys for the creditors committee thereupon offered to pay to the Calhoun Estate from funds otherwise available to general creditors this $26,000.00 difference in an effort to prevent an appeal by Calhoun's Estate from an approval and confirmation of the plan and to recognize the efforts made by Petitioners in this proceeding. The attorneys for the creditors committee and other interested parties feared that an appeal and its resulting delay in consummating any plan would greatly lessen the possibility of any disposition of the debtors' assets other than by liquidation sale, which would result in a substantial reduction in funds available for payment of creditor's claims. Petitioners, as attorneys for the Calhoun Estate, accepted the creditors committee proposal and an outline of the amended plan was thereupon announced to this Court. Because of the voluminous pleadings filed and the various positions taken by the Calhoun Estate in this proceeding, this Court of its own motion then made careful and *diligent inquiry* of Petitioners *whether payment to the Calhoun Estate pursuant to the reorganization plan as then formulated would resolve all matters which had been raised or could have been raised by Petitioners in this proceeding.* A transcript of the colloquy between the Court and Mr. John K. Calhoun, chief attorney for the Calhoun Estate and son of the deceased, is appended hereto as Appendix A.

I.

On the threshold, the Court rules that Petitioners are barred from seeking an allowance for services allegedly rendered the debtors' estate as a result of the colloquy

between this Court and Mr. Calhoun in Columbus, Georgia on March 30, 1965. At the May 4, 1965 hearing Petitioners sought to minimize the effect of Mr. Calhoun's statement, contending that he had not had the matter of attorneys fees in mind when making his statement. Whatever Mr. Calhoun's state of mind at that time may have been, the Court and all other interested parties had regarded the procession of pleadings filed by Petitioners to be at an end and were surprised when a later petition was filed requesting the allowance now sought. The Court's interrogation of Mr. Calhoun was made against a background of voluminous pleadings filed and various positions asserted, including a proposed reorganization plan filed by Petitioners on March 22, 1965, which plan contained a provision that the authors of the plan would receive stock in the reorganized corporation as compensation for their services. This plan of March 22nd was filed in expansion of an outline of said plan as set forth in a petition filed on March 9, 1965, which earlier petition sought to consolidate the assets of the three debtor corporations to pursue various alleged remedies against the former stockholders of the debtor corporations, and outlined a reorganization plan, including an award of stock in the reorganized corporation for Petitioners. Petitioners having so specifically referred to their desire for an allowance in pleadings previously filed in this proceeding, the Court holds that they are now barred from asserting a claim for such an allowance by virtue of their statements made in open court on March 30, 1965.

II.

The Court further holds that Petitioners are not en-

titled, as a matter of law, to compensation out of the assets of the bankrupt estate.

Under § 242 of the Bankruptcy Act *(11 U.S.C. § 642)*, allowances and reimbursement for costs and expenses may be made to parties in interest for services rendered and costs and expenses incurred in connection with the administration of an estate in a Chapter X proceeding or in connection with a plan approved by the Court. Alternatively, under § 243 of the Bankruptcy Act *(11 U.S.C. § 643)*, compensation for services rendered and reimbursement for proper costs and expenses incurred by creditors and their attorneys may be allowed in connection with the submission by them of suggestions for a plan or proposals in the form of a plan, or in connection with the administration of the estate only if those services contributed to the plan confirmed or to the refusal of confirmation of a plan or were beneficial in the administration of the Estate.

> "The mere fact.... that a claimant is a person to whom Chapter X permits compensation or reimbursement to be given does not mean that the claimant *must* be accorded an allowance. Nor does participation in the proceedings, however rightfully, create any absolute right to compensation or reimbursement."
>
> *6 Collier, Bankruptcy, § 13.02 at p. 4502 (14th Ed. 1964).*

The ultimate test under the statute is whether the services performed *benefited* the Estate, Id. at p. 4509, a question which must be determined by examination of the particular factual situation under which an application for allowance arises.

Did Petitioners' activities benefit the bankrupt estate? Neither Petitioners nor their clients were involved in the administration of the bankrupt estate. Petitioners' appearance in this proceeding was in their capacity as attorneys for the largest creditor of one of the debtor corporations. *It does, however, appear uncontroverted that Petitioners were the first parties in interest to contact the officials of Super Mold Corporation, of Lodi, California, a principal competitor of the debtor corporations, with reference to the possibility of purchasing either debtors' going business or the assets thereof.* However, this contact was made by Petitioners at a time when the interests of their client, the Calhoun Estate, were in a particularly precarious position. Petitioners then had notice of a petition filed by the Trustee requesting that this Court value certain engraving machines on which the Estate had a bond to secure title as security for its claim. Petitioners had always contended that the Estate was a secured creditor entitled to, in their words as set forth in a letter to this Court dated January 26, 1965, "the very first priority". The debtors' plan sought to value the Estate's security at $2,500.00. Petitioners, on the other hand, in a petition mailed to this Court on January 26, 1965, but never filed, contended that the Estate's security was of a value far in excess of this amount, if not in excess of its claim, and that the Estate was entitled to a fifteen month delay in all matters connected with this proceeding, during which time the Estate would have an opportunity to establish the value of its security. Petitioners were notified of a creditors meeting to be held on *February 12, 1965,* at which time the creditors would consider a plan submitted by the debtor corporation. This plan envisioned the valuation of the Calhoun Estate's

secured claim at $2,500.00 *and would have paid general creditors 40% of the amount of their claims.* Petitioners were thus confronted with the possibility that their client would receive only $2,500.00 plus 40% of any remaining balance of its claim. *Petitioners expressed their firm opposition to such a plan and thereupon contacted the officials of Super Mold Corporation*

The officials of Super Mold Corporation, upon becoming interested in acquiring the debtors' assets, began dealing with the attorneys for the Trustee and the creditors committee, and indicated that it would bid not less than $400,000.00 upon a sale of the assets of the debtors. Based *upon this indication, the attorneys for the Trustee and creditors committee prepared a proposed plan of reorganization. Petitioners filed a somewhat similar proposed plan of reorganization* on March 22, 1965, except that in Petitioners' plan, as previously indicated, Petitioners sought attorneys fees as compensation for their efforts in the proceeding. In the meantime, attorneys for the debtor and the ultimate purchaser of certain of the debtors' assets were seeking to amend their original plan. Ultimately, as previously outlined, an amended debtors' plan was worked out by interested parties on March 30, 1965, and was subsequently approved and confirmed. Petitioners had continued to assert in their proposed plan that their client was a secured creditor and the Estate was so designated in the debtors' plan finally approved and confirmed. The approved and confirmed plan was not submitted by Petitioners *nor were their services rendered in connection with said plan.* The plan finally arrived at was made possible only by the attorneys for the creditors committee agreeing to pay Petitioners' client from funds otherwise available to general

creditors approximately $26,000.00. *Now, at this late date, Petitioners* contend that their efforts benefited the estate as a whole, whereas, during the period of negotiations leading up to the final plan Petitioners maintained a position diametrically opposed to the interests of general creditors.

Petitioners cite in support of their petition the case of *In Re Consolidated Motor Parts, Inc., 85 F. 2d 579 (2 Cir. 1936)*. In that case attorneys for a certain class of creditors were awarded attorneys fees for their opposition to a proposed reorganization plan which they contended discriminated against their clients and thereafter concurred in a new plan more favorable to their clients. The Court pointed out (p. 581) that:

> "... the mere fact that work which has substantially aided the plan finally approved has been performed by an attorney for creditors or stockholders owning interests adverse to some of the other parties, does not necessarily deprive him of compensation. The question is whether the work in connection with the plan has been performed in good faith and has substantially contributed to the result finally achieved."

The Court distinguished certain other cases in which compensation had been denied on the ground that in those cases the Petitioners had not substantially assisted in the formulation of the plan that was finally adopted. A later case in the Second Circuit, *Newman & Biscoe v. Realty Associates Securities Corporation, 173 F. 2d 609 (2 Cir. 1949)*, disallowed allowances awarded by the lower court to the extent sought in connection with an unsuccessful attempt to require the debtor corporations

to pay increased interest on the applicant's client's claims. See also *Warren v. Palmer 132 F. 2d 665 (2 Cir. 1942)* referred to by the Court in the *Newman* case.

In *Glasser v. Doyle, 223 F. 2d 811 (2 Cir. 1955)*, the Second Circuit refused to increase an allowance awarded by the District Court to an attorney. The Court pointed out (p. 813) that:

> "... he is not a court appointed officer but is the lawyer privately retained to represent the interests of a preferred stockholders' committee in the reorganization proceeding ... The legal services of an attorney so situated may be competent, diligent and calculated to serve the best interests of his clients, yet prove to be of little benefit to the administration of the debtor's estate. That such a situation existed here was an entirely permissible conclusion on the present record. We find no compelling reason for holding, contrary to the trial court's best judgment, that the debtor's estate was enriched or its administration advanced to any great extent by the labors of this claimant, however competent and conscientious they may have been."

In the case of *In Re Vernan Mfg. Co., 92 F. Supp. 861 (D. C. W. D. Pa. 1950)*, the Court refused to make an allowance in connection with services of attorneys for a stockholder and creditor of the debtor corporation. Petitioner's counsel had performed services in preparation and formation of a plan of reorganization which was rejected by the majority of creditors. The Court concluded that petitioner's counsel had acted as mere volunteers as to their proposed, but rejected plan. Moreover, the Court pointed out (p. 864) that:

"Petitioner cannot reasonably contend that his plan contributed substantially to rejection of the initial plan proposed by the Trustee, for Petitioner himself avers that the plan exists in amended form; or, if I conclude that the initial plan has been rejected, petitioner's opposition thereto was only a fragment of the opposition exerted by the majority of merchandise creditors.

"Were I to conclude that the plan of petitioner's counsel was beneficial to the estate, yet it is apparent that counsel acted solely for the interest of petitioner, the creditor by whom he was named to act. Even if services are beneficial to the administration of an estate, but were rendered in the sole interest of a creditor or stockholder, our courts have sustained the view that allowance may not be made for such services (citing cases)."

See also *London v. Snyder, 163 F. 2d 621 (8 Cir. 1947); Matter of 32-36 N. State St. Bldg. Corp., 164 F. 2d 205 (7 Cir. 1947).*

The standards governing this Court's deliberation on Petitioners' application have been best summed up in *11 Remington, Bankruptcy, § 4685 (1961 Revised.)* as follows:

"The right of an attorney to receive an allowance depends upon his representation of a class or some member of a class entitled to participate in the proceeding. The allowance is not for services rendered to the client, but for services rendered in assisting the client in rendering services which are compensable. If the attorney's efforts are directed primarily to promote his client's interests, the client

should pay him, and an allowance out of the estate is not called for. Attorneys representing creditors, security holders, or stockholders must look to their clients for compensation, rather than to the estate. The basis for an allowance is that services of value to the estate have been rendered—services which benefit all sets of interests in the estate."

This Court is of the opinion that the benefits to the bankrupt estate, if any there be, rendered by Petitioners in vigorously and diligently prosecuting the interests of their client, often to the possible detriment of other creditors of the debtor corporations, were too remote, unintended, and incidental to the primary purpose of said efforts to be susceptible of valuation by this Court, or compensable by allowance in this proceeding.

Accordingly, for the reasons set out in Section I and Section II of this opinion, Petitioners' application for attorney's fees and expenses is denied.

IT IS SO ORDERED this 14th day of July, 1965.

J. Robert Elliott
United States District Judge

THE COURT: The other thing I want to be sure of, if this plan goes through, Mr. Calhoun, every matter concerning which you have suggested any issue and every question which you have raised by any of the pleadings which you have filed in connection with the matter or any which could have been raised which you have not raised, will be terminated and disposed of; is that understood?

MR. CALHOUN: Your Honor, I'm happy to be bound by the agreement and upon the approval of a plan which provides $98,724.15 in cash, everything that we have in this proceeding will be dismissed.

THE COURT: Well, when you say "in cash", you mean at the same time all the other creditors are paid?

MR. CALHOUN: At the same time as the other creditors.

THE COURT: At the same time all the other creditors are paid.

MR. CALHOUN: Yes sir, and yet, we wish to reserve our right to dismiss until that date.

THE COURT: Oh yes, but the plan, when we talk about "the plan", when the plan is approved, if the Court approves it, that terminates every question which you have raised or could have raised?

MR. CALHOUN: Yes sir, I would rather state it that when a distribution is made under the plan, that settles everything, terminates everything.

THE COURT: All right, I wanted to be sure of those two things.